No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITIONER JOHNSON'S RESPONSE TO THE RESPONDENT'S REPLY TO OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

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Pet. Reh. Ex. *2

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The Respondent J.O.L. II has filed a last-minute Reply to Petitioner Johnson's Opposition to his Motion to Dismiss. It was delivered, in counsel's absence, during the late afternoon just prior to the matter

being presented to this Court the next morning and at a time when it was impossible for counsel to respond.

The Reply is largely an original Motion, for it supplies some Points and Authorities whereas none were submitted with the Motion so they could be responded to, and it adds an alleged "stipulation" that was never give before during the more than 42 months of litigation in this cause. It provides both less than 24 hours before it was known that the matter was to be presented to the Court, and at a time when Mr. Johnson was without means to deal with it. Apart from whether a Reply is appropriate, certainly the failure to put this material in the original Motion so it could be addressed in the normal time given for an Opposition deserves note and warrants its rejection. Coming at this last minute, in a case where the Briefs are to be filed on November 20,

within a few days, it is simply too late, and unfairly so. Further, when the parties were notified on October 6, 1980 that Mr. Johnson's Petition for the Writ was granted, they were informed that it would be set for oral argument in the January session with John Doe and Jane Roe v. Delaware, No. 79-5932. At the same time, counsel were informed there would be no continuances of the Briefs or Joint Appendix. That aspect of the case has proceeded. In this circumstance, the very last minute filing of this Reply in this circumstance and on these grounds --- a voluntary action now taken after all the multiple refusals to do so earlier --- should be rejected in any event, unless it is indisputably clear that there is no possibility of a case or controversy before this Court. While we do not think it appropriate for a party to initiate a Motion without its bases stated so that it

could be responded to, and then, within 24 hours before the Court is to consider the matter, to submit his basic Points and Authorities, without an opportunity for counsel to respond in the normal course, still we recognize that even sua sponte this Court would have to consider whether a matter before it is moot. Normally that would occur where events or dates have passed which moot the cause. Here, while we have the respondent acting on his own to attempt to create that condition, we suggest that even this last minute effort hardly answers our Opposition. As a consequence, we have had to submit, for whatever consideration the Court may wish to give it, and on this very short notice, the matters set forth herein. We first address omitted factual matters, misapplications of the legal principles, and then misreadings of the cases cited in the Reply.

1. By no means is it clear, on the basis of the record, that this cause is moot. For reasons we have already stated, we think it indisputably not moot, if for no other reason, however characterized and altered in this last-minute Reply, this is nothing more than a voluntary cessation of the action by a person who could return to his previous ways. That doctrine is not circumscribed to apply only to "officials" or to "illegal" conduct. The thrust of the reason for that principle is not the characterization of the action, nor the name or office of the person, but rather that the promise of voluntary change, withdrawal or cessation --- unilaterally made while the law remains unchanged --- allows him to "return to his old ways under the existing circumstance." That is precisely the case here. The just filed Reply tries to create a special circumstance for

application of that principle (to officials or illegalities only) that simply does not exist. In our view respondent's actions are "illegal" in the sense of the constitutionally impermissible, just as in the cases noted the acts were illegal because they were statutorily impermissible. That aside, these parties can go right back and do what they did before and seek an adoption; or so may one on their behalf, or the children.

They attempt now, 24 hours before this matter is considered, after it has been pending in the Courts for three and a half years, to "stipulate" to what they "stipulated" in the original divorce in 1968 and in two Court orders in 1971 and 1972, but never fulfilled. They refuse any relief for more than 1200 days and on the final day, just before consideration by the Court, assert through a statement by counsel that they will tell the lower Court they will

not seek an adoption hereafter. Interestingly, (a) they do not confess error in the action; (b) nor do they still cover acts or contingencies to be done by others; (c) nor do they even now say that if this Court denies their Motion but rules for them on the merits, after oral argument, that they will agree to vacating the Order, which is an entirely different matter from what is stated in the Reply.*/

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*/ We have no doubt that if this Court should, as we think it must, deny the Motion, or if it denies it without prejudice to raise the issue of mootness in the Brief on the merits, they may well then say something to this effect. It will be no more believable, as Mr. Johnson's affidavit attached to our Opposition reflects, than their other proffers. That has been their course and conduct throughout. Only when absolutely compelled do they agree to something; and then only verbally, followed by acts that do not carry it out. It should be borne in mind that the persons who are saying they are willing now to "stipulate" also stipulated in 1968 in a settlement agreement incorporated in the Court Decree to grant visitation rights which they did not; they stipulated to a Consent Order

These matters aside, the simple fact is that years later, after all the actions taken here, a statement of this kind made for the first time, 24 hours before the matter is considered by the Court, is simply not to be accepted. Mr. Johnson has filed an Affidavit which stands unrebutted before this Court. It reflects a record showing that these individuals appear to have no respect for any Court Order where the children are involved. Further, they would always have an excuse to avoid the statement made by counsel in any event; the excuse would be changed circumstances, which could always be charged or serve as

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*/(continued) below that they would allow fair visitation, and they did not. They resisted every effort in the years of litigation by means which show that when the children have been involved, no statement that they have made is to be relied on. Indeed, if present counsel ceased representing them in the future, even this promise in a Reply would have no effect.

a justification for further action. Clearly when Mr. Johnson asks for joint custody or very heightened visitation that claim could be made. The fact is that with children and custody-related matters, the circumstances are constantly changing. The use of the adoption statute at issue and its "best interests" standard is thus a real fear, and a chill of clear substantive and procedural rights, once the attempt is made to exercise the substantive constitutional rights in the relationship.

Even if this last minute statement were credible, this Court cannot say, as a matter of law, that there is no reasonable expectation that these individuals on this record would not do the same thing.

Apart from that, they are not the ones alone who determine the matter.*/

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*/Their position now neither precludes others nor the children themselves. Indeed, the children have their own separate interest that the stepfather cannot represent.

Nor has the Reply responded to the fact that there is no assurance whatsoever that the D.C. Court of Appeals will withdraw its Opinion, and in fact we suggest that it will not. Nor will the Trial Court necessarily withdraw its decision, since it has clearly found that the alleged "best interests of the children" require an adoption.

The only "fact" that has occurred between that finding and now is that this Court granted the writ of certiorari.

Respondent suggests that they do not have any interest in the enforcement of the statute. They had a very strong interest in the enforcement of the statute for three and a half years, until 24 hours before this Court is to consider the Motion. Of course the District of Columbia has been notified about the pendency of the action as required by Rule 28, since the constitutionality of the statute is in question

and at issue; and the same will apply to the Briefs to be filed. The issue squarely before the Court of Appeals in its Opinion was nothing more than this issue: the constitutionality of the statute, procedurally and substantively; and this Court properly granted the writ to hear the issue that the Respondent urged on the Courts below --- that the statute is constitutional; it applies here and to Mr. Johnson; and it can be used to obtain an adoption. It borders on the disingenuous to suggest otherwise.

The Reply next suggests that the cause is private, and there is no public interest in it. There is considerable public interest in this case, reflected by the repeated attempts to present views of various groups by amici who filed in the case of Doe v. Delaware, 79-5932 with which this case is to be heard "in tandem" according to the

notice of grant of the writ; and from other groups; and there has been considerable media interest reflecting public interest as well.

This Court does not take cases that do not have significant public interest in them. This is one of those cases which not only has the kind of public interest that is reflected in its very grant of the writ; it involves one of the most important relationships, if not the most important relationship, in society that is in itself a matter of great public interest.

Therefore, unless it is indisputably clear and undeniably the case under the decided law, that there is no case or controversy or stake in the outcome, this Court should deny the Motion on this ground as well.

The public interest now is as great or greater, and the controversy is as real as it was when the suit was filed <u>against</u>

Mr. Johnson three and a half years ago, or on the day the Motion was filed, after the grant of the writ. The best interests of the children, whatever that may mean, and the constitutionality of that concept has not changed, nor is it changed by this Motion; and its application to Mr. Johnson has not been altered one whit. The position of the children has not changed; the position of Mr. Johnson has not changed; the statute has not changed; the ruling of the Trial Court has not changed; the Court of Appeals' decision has not changed. The only "change" is the grant of the writ followed by a statement in his Motion agreeing to a vacating of the order without a confession of error or the other matters noted in our Opposition; and now in his just-filed Reply a reference to some cases and a further statement he will tell the lower Court he will not seek an adoption in the few

years remaining before the children reach majority.

2. The Reply just submitted does not adequately reply to the voluntary cessation principles in the cases noted in our Memorandum in Support of the Opposition to Motion to Dismiss, p. 19. Nor does it address Roe v. Wade, 410 U.S. 113, 125 (1973) or DeFunis v. Odegaard, 416 U.S. 312 (1974), both of which we noted at length; nor the principles at p. 22, citing points in DeFunis dissents, with which the majority does not take issue but which it differently applied in that case. Applying the first test of United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 to this case, respondent attempts to limit it to public officials. The cases do not support him. Nor do they support his suggestion that there must be some statutory violation at issue before it applies. We urge this is neither so nor should be so.

He then supplies us for the first time with his reliance on references in Weinstein v. Bradford, 423 U.S. 147, 149 (1975) to the fact that the capability of repetition concept allegedly applies only where (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. He also cites Gannett*/, Nebraska Press**/, and Sosna***/. He turns that concept on its head, however, after wholly extracting it from context when he argues that our "duration" was not too short. It is too short,

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*/ Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979).

**/ Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791 (1976).

***/ Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975).

where the cessation or expiration is something he can do at any time. If he can do what he wants to do now, and then himself cease and cause the action to expire at any time it will always be too short to be fully litigated because he could do this at any stage. That meets the first part of Weinstein. Indeed as noted in Nebraska Press (where the order at issue had expired) if this Court does not address our matter now, then on any review again, the next "dispute will evade review, or at least considered plenary review in this Court ...." 427 U.S. 539, 547, 96 S.Ct. 2791, 2797 (1976). That is so because by then the children or at least one of them will have reached majority so that we will be truly in a non-repeatable Weinstein/Sosna situation, solely because of delays in reaching the issue of the constitutionally impermissible.

The second element cited from Weinstein as to potential repeatability is so clearly met by our undisputed record that it would be unduly repetitious to underscore it.*/

One more last-minute suggestion of the Reply is that the statute might be changed. That is true in every case and not a basis for mootness.**/

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*/ It might be noted in this regard that this is a case where Mr. Johnson is not a plaintiff, which might enable him more readily to file a class action. He is a defendant having a right taken away, initiated by the Respondent stepfather defending on the ground that the source of the action or any other action is a statute that is unconstitutionally applied to him.

**/ There is no indication that the statute is going to be changed at all; and, indeed, if we read the direction of the law, it is quite to the contrary. The tendency has been to expand the power of the State in this area to parental termination statutes and broader sweeps. It does apply now and it will continue to do so; and it was applied here not only to affect past facts and relationships but also the present and the future.

Contrary to what is asserted at page 3 of his Reply, there is general importance and "public interest in litigating the validity of the District of Columbia" adoption statute authorizing an adoption in the face of a natural father's objections, solely on the basis of considerations of "best interests of the children" where there is no unfitness, abuse or abandonment.*/

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*/ The Reply suggests that the fact there were other issues in the case below is more reason for a remand. That is specious. The issue is collateral consequences; and, indeed, in County of Los Angeles v. Davis, 440 U.S. 648, 99 S.Ct. 1379 (1979) this Court suggested that the basis of mootness there was not only that there was no expectation that the violation would occur again, but also that the interim relief and events completely and irrevocably eradicated the effects of the action. That is not the case here at all.

The strong public interest that was evidenced by this Court's grant of the Petition remains. The case, the controversy and the disputes remain. The assertions in this last-minute Reply are not responsive to the issues nor the pertinent cases we have referred to. It might be noted that the underlying facts asserted in our Opposition are not disputed. In their stead is the customary attempt to characterize facts by some phrase such as "shrill rhetoric" (Reply p. 1); it transparently is no substitute for record facts; facts which may even be "shrill" over these many years.

While we do not believe that there can be serious doubt that all of the factors which prevent this cause from being determined as moot are clear, and for that reason, the motion to dismiss should be denied forthwith, we certainly are of the view, and we think it is indisputably the

case, that it should not be granted on this record and in this circumstance.

The final irony is that the Motion to Dismiss has now added a further matter of moment to the other issues as to which the writ was granted --- a case and controversy about mootness standards themselves, in this kind of cause through this method.

The Motion should be denied.

Respectfully submitted,

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I HEREBY CERTIFY THAT three copies of the foregoing were hand-delivered to the office of Hal Witt, Esquire, 1620 Eye Street, N.W., Washington, D.C. 20006, attorney for Respondent, this 17th day of November, 1980.

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